[2012] UKUT 359 (TCC)

Appeal number FTC/87/2011

Value Added Tax – were storage units immovable property? - held no - was right to store goods in units exempt supply of licence to occupy land or standard rated supply of storage services? – held if units were immovable property then exempt supply of licence to occupy land otherwise standard rated supply of storage services - was single supply a supply of licence to occupy land or of storage services? – held single supply of storage services - appeal allowed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

- and –

UK STORAGE COMPANY (SW) LIMITED

Respondent

Tribunal: Judge Greg Sinfield
Judge Edward Sadler

Sitting in public in London on 9 and 10 July 2012

Michael Jones, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

Michael Conlon QC, instructed by Freshfields Bruckhaus Deringer LLP, for the Respondent

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DECISION

Introduction

1. This appeal concerns the VAT liability of self-storage. In return for a fee, the Respondent ("UK Storage") allows customers to store goods in secure and numbered units at its premises. The Appellants ("HMRC") decided that UK Storage's services were chargeable to VAT at the standard rate. UK Storage appealed against that decision to the First-tier Tribunal ("FTT"). In a decision released on 12 August 2011, [2011] UKFTT 549 (TC), the FTT allowed the appeal and held that supplies by UK Storage were supplies of the leasing or letting of immovable property and, accordingly, exempt.

2. HMRC now appeal against the FTT's decision to this Tribunal. HMRC contend that the FTT erred in law in three respects, namely in concluding that:

(1) the storage units were immovable property;

(2) the agreements between UK Storage and its customers in relation to the storage units were licences to occupy which conferred an exclusive right to occupy the units; and

(3) the principal or predominant element of UK Storage's supply was a licence to occupy a specific storage unit or area of land.

3. For the reasons given below, we conclude that the FTT did make an error of law and UK Storage did not make an exempt supply of leasing or letting of immovable property. Accordingly, we allow the appeal. Our decision may be of largely historic interest as, with effect from 1 October 2012, the grant of facilities for the self-storage of goods is (subject to some irrelevant exceptions) excluded from the exemption for supplies of land by paragraph (ka) of Group 1 of Schedule 9 to the VAT Act 1994 ("VATA").

Facts

4. UK Storage provides self-storage facilities to members of the public at two sites but this appeal is only concerned with one, the site at Norton Fitzwarren near Taunton in Somerset ("the Premises"). HMRC did not challenge any of the findings of fact by the FTT. Those findings are set out at [7] to [17] of the decision and may be summarised as follows.

(1) The Premises consist of a concrete-surfaced compound surrounded by a secure perimeter fence and are monitored by 24 hour security. Within the compound are around 300 individual single storey storage units. Each unit at Norton Fitzwarren is self-contained and is fully enclosed with a base, sides and a roof. The units can be accessed from outside, either by a roller shutter front door or by a side door, depending on the type of units. The units are constructed from steel sheet and are clad in 0.4 mm and 0.8mm steel cladding. They weigh 600 kg, and are designed to hold a load of up to 6 tons when sitting on a flat surface.

(2) The units are erected on site by a trained team of self-employed fitters. It takes a team of three persons one day to assemble one storage unit. Once assembled the storage units are lifted into place by a tele-handler (a tractor-like vehicle with single telescopic boom that can extend forwards and upwards from the vehicle and that can be fitted with a forklift attachment) using a lifting frame and straps. The units are positioned side-by-side in gap-free rows. A second row of units is then lifted into position and placed back-to-back with the first row so as to create a block.

(3) When in position the storage units rest upon the ground under their own weight and are not fixed to the ground. The units sit in shallow bays between concrete paths which run between the rows and which are four inches higher than the bays in which the units sit.

(4) The units are not designed to be lifted or moved with goods inside them. Any attempt to move the units with goods inside them would cause irreparable and permanent damage to the unit itself and probably to the customer's goods. It is feasible that the units could be moved either in whole or in parts to another site when empty, but that was never the intention of the company and it would probably be easier and more economical for the company to erect new units elsewhere. No units at the Premises had been moved or removed once put into place, and there was no intention on the part of the company to do so.

(5) The units can be dismantled. It would take two man-days to do so. A dismantled unit might also thereafter be reassembled but it could not be guaranteed to be watertight following reassembly.

(6) UK Storage makes self-storage units available to customers for a fee. The customers enter into a standard form of licence agreement ("the Agreement") for an indefinite period terminable by either party on one weeks' notice, the fee being based on the duration of storage, plus, if required, an additional fee for the goods stored to be covered by insurance supplied by UK Storage.

(7) The opening hours of the Premises are 8.30am-6pm Monday to Friday and 9am-4pm Saturday but customers are able to opt for 24 hour access to the facility on payment of an additional fee.

Legislation

5. Article 135(1)(j) and (l) of Council Directive 2006/112/EC (the "VAT Directive"), formerly article 13B(b) and (g) of Directive 67/227 (the "Sixth Directive"), provide as follows:

> "1. Member states shall exempt the following transactions (inter alia):
>
> …
>
> (j) the supply of a building or parts thereof, and of the land on which it stands, other than the supply referred to in point (a) of article 12(1);
>
> …

(l) the leasing or letting of immovable property.

6. Article 135(2) excludes, among other things, the hire of safes from the exemption in Article 135(1)(l).

7. Article 12 of the VAT Directive (formerly Article 4 of the Sixth Directive) provides, so far as is relevant:

> "(1) Member states may regard as a taxable person anyone who carries out on an occasional basis…. one of the following transactions:
>
> (a) the supply before first occupation of a building or part of a building and of the land on which the building stands …
>
> (2) for the purposes of paragraph (a), 'building' shall mean any structure fixed to or in the ground."

8. Article 135(1)(j) and (l) are implemented into UK domestic legislation by the VATA. Section 31(1) of the VATA exempts a supply of goods or services if it is of a description for the time being specified in Schedule 9 to the Act. Item 1 of Group 1 of Schedule 9 is as follows:

> "1. The grant of any interest in or right over land, or of any licence to occupy land….."

FTT's decision

9. The FTT set out its conclusions on the facts at [67] to [75] of the decision. In relation to the issue of whether the storage units are immovable property, the FTT concluded at [67] – [70] that:

> "67. With regard to the concept of movability or immovability we accept that there is a scale of degrees. Also, following *Maierhofer*, that whether the units are to be regarded as movable or immovable depends where on this scale they fall. …
>
> 68. In the present case the storage units could fairly be described as being much more permanent and immovable than those in *Finnamore*. In fact in *Finnamore* the Tribunal concluded that, literally speaking, the containers were movable but that it is necessary to look at the whole circumstances. That is correct and equally true in the present appeal.
>
> 69. … in our view whether or not a structure is movable or immovable is a relevant constituent element to be determined in deciding whether the overall nature of the transaction can be described as a leasing or letting of land. The Legislation must be interpreted in a way which gives effect to the wording and purpose of the Directive. To do so it is necessary to decide from an objective standpoint whether the core function of the unit is for it to be movable. Applying the principles set out in *Maierhofer* the structure, 'to be immovable'

and construing the word in the light of the concepts used in Article 12(2) (definition of 'building'), must be firmly fixed to but not necessarily inseverable from the ground. Although not bolted to the ground the units were for all practical purposes fixed to the ground.

5 70. It is implicit within the concept of 'movability', that a structure can be moved without difficulty, and after being dismantled, reassembled elsewhere intact. The storage units at Norton Fitzwarren are of rigid construction slotted into bays lying 4 inches below the concrete apron which give access to them. They cannot be moved either easily when empty or at all when goods are 10 stored in them. We accept that if the units were dismantled they could not be re-erected elsewhere in a way that would guarantee their structural integrity and that they would be waterproof. They are not designed to be easily moved. The units were demonstrably not for the transportation of goods. They are not movable containers. It is feasible that the units could be moved either in 15 whole or in sections to another site but, on the evidence, that was never the intention and given the potential damage to the units and the length of time it would take them to be dismantled and re-erected, it would probably be easier and commercially more economic for UK Storage simply to erect new units elsewhere. Realistically therefore the structures can only be enjoyed in situ 20 and are not designed to be moved. By any objective standard the units are designed to put to practical purpose the use and enjoyment of the parcel of land or space which they occupy. Therefore the conclusion which we reach is that the units are 'immovable property' within the meaning of article 135(1)(l) [VAT Directive]."

25 10. The FTT set out its conclusions on the issue of whether the agreement between UK Storage and its customers was a lease or licence to occupy at [71] to [72] of the decision as follows:

"71. We accept that the inclusion in UK Storage's licence agreement at clause 11, of the provision that the agreement 'shall not confer ... any right to 30 exclusive possession,' did not affect its legal status as a licence which conferred rights of occupation. The most important characteristic of a lease as opposed to a licence to occupy is that of exclusive possession. Unless exclusive possession has been granted there is no lease, but there may still be a licence.

35 72. In our view the purpose and intent of clause 11 was to prevent the possible suggestion by a customer that he enjoyed a lease which would have conferred security of tenure and possibly a right of occupation of the unit beyond cessation of the contractual term of letting. Clause 11 was in fact probably unnecessary and simply reinforced the provisions of clause 36 of the 40 agreement, which stated that the agreement 'shall not create a tenancy lease or similar agreement'. Clause 11 was included in order to ensure that customers did not have a continuing right of occupation or security of tenure beyond the termination date referred to in the agreement. It was not intended to prevent

customers enjoying ‘exclusive possession’ of the unit, as against third parties. The customer agreement was therefore a ‘licence to occupy’.”

11. In relation to the characterisation of the single composite supply, the FTT concluded at [73] of the decision:

> "73. Where a transaction consists of a number of features, all of the circumstances in which it takes place must be considered. However we agree with Mr. Conlon that this is not a package of supplied services. The units were designed for and enabled the use and enjoyment of the land which they occupied and were a necessary feature of the storage facilities offered. The units were designed for and enabled the use and enjoyment of the land which they occupied and were a necessary feature of the storage facilities offered. It was simply the letting of space in which a customer stored his goods and of which he was entitled to exclusive possession. … It would be entirely inappropriate from an economic point of view to artificially split the service provided by UK Storage into distinct and separate supplies. The essential feature of the transaction was that there was one element, being a licence to occupy an identified unit of property and parcel of land. This was the principal service offered to which other services were entirely ancillary. … Security on the site and weatherproof storage were ancillary services as they simply provided a means of better enjoying the principal element of the supply which was the provision of a licence to occupy the unit of property or land. There was therefore only a single supply of a licence to occupy land."

Construction and application of legislation

12. Before addressing the first two grounds of appeal, it is convenient at this point to examine how the provisions relating to exemptions generally, and the exemption at issue in this appeal in particular, should be interpreted and applied.

13. It has been held on many occasions by the Court of Justice of the European Union (“CJEU”) and was common ground between the parties that the exemptions in Article 135 of the VAT Directive have their own independent meaning in Community law and must, therefore, be given a Community definition. Thus, the interpretation of the expression “leasing or letting of immovable property” in Article 135(1)(l) of the VAT Directive cannot be determined according to a Member State’s domestic concepts (see Case C-315/00 *Maierhofer v Finanzamt Augsburg-Land* [2003] STC 564, at [25]-[26]).

14. Further, the exemptions provided for by Article 135 of the VAT Directive are to be construed strictly but not restrictively. This follows from the basic principle of the VAT Directive that the supply of all goods and services is subject to VAT, if effected for consideration by a taxable person acting as such, unless expressly exempted (see Case C-461/08 *Don Bosco Onroerend Gad v Staatssecretaris van Financien* [2010] STC 4760 at [25]). The requirement of strict interpretation does not mean that the provisions for exemption must be interpreted restrictively as the Advocate General in Case C-284/03 *Belgian State v Temco Europe SA* [2005] STC 1451, observed at [37]:

> "… that requirement of strict interpretation does not mean that the terms used to specify exemptions should be construed narrowly or restrictively so as to deprive the exemptions of their intended effect."

See also the CJEU in *Temco* at [17].

15. Finally on this point, Chadwick LJ said in *Expert Witness Institute v Customs and Excise Commissioners* [2001] EWCA Civ 1882, [2002] STC 42 at [17], that the Court is not required to give the words in the exemption the most restricted, or most narrow, meaning that can be given to them.

> "A 'strict' construction is not to be equated, in this context, with a restricted construction. The court must recognise that it is for a supplier, whose supplies would otherwise be taxable, to establish that it comes within the exemption, so that if the court is left in doubt whether a fair interpretation of the words of the exemption covers the supplies in question, the claim to the exemption must be rejected. But the court is not required to reject a claim which does come within a fair interpretation of the words of the exemption because there is another, more restricted, meaning of the words which would exclude the supplies in question."

That passage was endorsed by the Court of Appeal in *HM Revenue and Customs v Insurancewide.Com Services Ltd & Anor* [2010] EWCA Civ 422 at [83].

16. It was also common ground that the exemptions in Group 1 of Schedule 9 to the VATA must be interpreted consistently with the equivalent European legislation. This principle of consistent interpretation was established by the CJEU in Case C-106/89 *Marleasing SA v La Comercial Internacional de Ailmentacion SA* [1990] 1 ECR 4135, and has been confirmed in subsequent cases. In *HM Customs and Excise v Sinclair Collis Limited* [2001] STC 989 (HL), the House of Lords decided, before referring the case to the CJEU, that "licence to occupy" in Group 1 should be interpreted as having a meaning consistent with the equivalent European concept, "leasing or letting of immovable property". In particular, Lord Slynn (with whom Lord Steyn agreed), at [13], said:

> "It is thus plain that the words "licence to occupy land" in the 1994 Act cannot go wider than the words "leasing or letting of immovable property" in the Sixth Directive."

Immovable property

17. HMRC's first ground of appeal is that the FTT failed to apply the test and guidance set out in *Maierhofer* correctly and therefore erred in concluding that the storage units are "immovable property".

18. The *Maierhofer* case concerned the VAT liability of the letting of pre-fabricated buildings used by a German regional government for housing asylum seekers. The buildings were single-storey and two-storey structures which were bolted to concrete foundations. Mr Maierhofer let the buildings for a minimum period of five years,

subject to extension. Sometimes the buildings were on land leased by Mr Maierhofer and sometimes the buildings were on land leased by the regional government. At the end of the letting period, the buildings had to be removed. The buildings were not permanent and could be dismantled by eight persons in ten days and re-used elsewhere. The tax authority took the view that the letting of such buildings was not a supply of immovable property and so could not be exempt. Mr Maierhofer appealed and the matter was eventually referred to the CJEU.

19. In answering the questions referred by the German Court, the CJEU focussed on the meaning of the term "letting of immovable property". In relation to the concept of immovable property, the CJEU did not provide an exhaustive definition of immovable property but held at [35] that the letting of a building constructed from prefabricated components fixed to or in the ground in such a way that they cannot be either easily dismantled or easily moved constitutes a letting of immovable property for the purposes of the exemption, even if the building is to be removed at the end of the lease and re-used on another site. The CJEU also stated at [35] that the structures do not need to be inseverably fixed to or in the ground and the term of the lease is not decisive.

20. We conclude from *Maierhofer* that, in order to be immovable property for the purposes of the exemption, a building or structure must be fixed to or in the ground in such a way that it cannot be either easily dismantled or easily moved. The fact that the building or structure is not inseverably fixed to or in the ground and that it will or might be removed at some point in the future does not prevent it from being immovable property. We also consider that whether the building will or could be re-used on another site is not relevant in determining its status as movable or immovable property.

21. In our view, applying *Maierhofer*, it is necessary in this case to ask the following questions:

(1) were the storage units fixed to or in the ground?

(2) if so, could the units be

(a) easily dismantled and removed; or

(b) easily moved without being dismantled?

In order for the storage units to be classified as immovable property, the answer to the first question must be "yes" and the answer to both parts of the second question must be "no".

22. Mr Michael Jones, who appeared on behalf of HMRC, submitted that the FTT erred in concluding that the units were immovable property having found at [15], that "the storage units rest upon the ground under their own weight in the surrounding concrete and are not fixed to the ground" and, at [70], that it was "feasible that the units could be moved either in whole or in sections to another site". Mr Jones submitted that, having found that the units were not bolted to the ground, the FTT was not entitled to conclude, at [69], that they were "for all practical purposes fixed to the ground" as that was not the test according to *Maierhofer*. Mr Jones also criticised the

FTT for taking account, at [70], of evidence that UK Storage never intended to move the units in deciding whether the storage units were immovable property.

23. Mr Michael Conlon QC, who appeared for UK Storage, submitted that there was no error of law in the FTT's approach to the question of whether the letting was of immovable property and HMRC's appeal was, in effect, an attack on the FTT's findings of fact. The FTT's findings of fact could only be overturned if they were irrational or perverse in the terms described by Lord Radcliffe in *Edwards v Bairstow* [1956] AC 14 at 36.

24. Mr Conlon referred us to the judgments of the CJEU in Case C-275/01 *Sinclair Collis v HM Customs and Excise* [2003] STC 898 at [26] and Case C-270/09 *MacDonald Resorts Limited v HMRC* [2011] STC 412 at [46] as showing that it was necessary to take account of all the characteristics of the transaction and the circumstances in which it took place. We note that the issue in both cases was whether there was a leasing or letting, not whether the subject of the letting was "immovable property".

25. Mr Conlon contended that the FTT's reference to the intentions of UK Storage should be regarded as part of the FTT's findings as to the objective characteristics of the units. He submitted that this was particularly clear from the following in [70] of the decision:

> "Realistically, therefore, the structures can only be enjoyed in situ and are not designed to be moved. By any objective standard the units are designed to put to practical purpose the use and enjoyment of the parcel of land or space which they occupy. Therefore the conclusion which we reach is that the units are 'immovable property' …"

26. We do not regard the passage from [70] as supporting Mr Conlon's submission. The word "designed", which appears twice in the passage, appears to refer to an intended use. In our view, the FTT, having referred in [69] to the principles set out in *Maierhofer*, failed to apply those principles properly. The FTT considered that the concept of movability was key. The FTT concluded, at [69], that the units, although not bolted to the ground, were for all practical purposes fixed to the ground. This is not how the CJEU expressed the first question in *Maierhofer*. The first question is simply whether the structure is fixed to or in the ground. Had the FTT asked whether the storage units were fixed to or in the ground then the only answer that it could have given, having found that the units were not fixed to the ground but rested on their own weight and that they could feasibly be moved, was that the units were not fixed to or in the ground. How the units are enjoyed and the "practical purposes" are not to be substituted for the test of whether the units are fixed to or in the ground based on objective characteristics of the units. It follows that, in our view, the storage units are not immovable property.

27. Given the answer to the first *Maierhofer* question, it is not necessary to consider the second which is whether the building or structure could be easily dismantled or easily moved. In case we are wrong, however, we point out that even if the units had

been found to have been fixed to or in the ground, they would not, in our view, be immovable property as they could be easily dismantled.

28. We consider that the FTT did not apply the correct test, as set out by the CJEU in *Maierhofer*, when considering whether the units could be easily dismantled. At [70], the FTT seems to have added a further condition to the question, namely whether the dismantled units could be "re-erected elsewhere in a way that would guarantee their structural integrity and that they would be waterproof". The CJEU in *Maierhofer* referred to the fact that the structures in that case could be re-used elsewhere but that was not part of the CJEU's reasoning. In our view, whether a building is capable of being reassembled intact elsewhere is irrelevant in considering whether it can be easily dismantled.

29. Further, we do not consider that the findings of the FTT that it would take two man days to dismantle a storage unit support the conclusion that the units were not easily dismantled. In *Maierhofer*, it would have taken eight persons a period of ten days to dismantle the structures. The CJEU at [33] held that the structures in that case could not be easily dismantled. This was in contrast to tents and light-framed leisure dwellings that, as the CJEU observed in [31], could be easily moved (which we interpret to mean taken down or dismantled). In our view, it is not possible to specify the number of persons or period of time required before a building or structure ceases to be easily dismantled but we consider that two man-days, in relation to the storage units, does not establish any material degree of difficulty in dismantling the units. We consider that the units in this case are closer to the light-framed leisure dwellings referred to by the CJEU than the structures at issue in *Maierhofer* and the FTT erred in not concluding that the storage units could be easily dismantled. On the facts as found by the FTT, we consider that the only conclusion that it could have reached was that the units could be easily dismantled and removed and, therefore, were not immovable property.

30. The FTT also found that the units, when empty, could not be moved easily but could feasibly be moved without being dismantled although that was never intended by UK Storage and never actually done. The FTT found that the units were not for the transportation of goods and were not movable containers. We consider that the question posed by the CJEU in *Maierhofer* has to be answered based on the objective characteristics of the structure. Approached in that way, we consider that the only conclusion that the FTT could have reached on this point was that the units were capable of being moved by the tele-handler. The units were clearly not intended to be used as transport containers but that is not the relevant test. In the context of whether or not the unit is immovable property, the relevant question is can it be moved easily from one place to another. The fact that the units were not actually moved is also not relevant to their status as movable or immovable property. The movement need not be over any great distance.

31. It is clear that the storage units were easily moved into place initially by the tele-handler and there was nothing in the facts found by the FTT to suggest that they could not be moved subsequently just as easily. Mr Conlon pointed out that it would be more difficult to move a unit in the middle of a row and we accept this but the fact

that a number of units may have to be moved in order to reach a particular unit does not seem to us to increase the difficulty materially. In any event, that is not a relevant factor when considering the question of whether that particular unit, viewed in isolation, can be moved easily which is the correct approach where, as here, there was no finding that the units were in any way structurally linked to each other or dependent upon each other for their structural integrity.

Leasing or letting

32. HMRC's second ground of appeal is that the FTT erred as a matter of law in holding, at [72], that the Agreement entered into by UK Storage with its customers amounts to a "licence to occupy land" for VAT purposes. As we have concluded that the subject matter of the Agreement between UK Storage and its customers was not immovable property, it follows that the Agreement cannot be a licence to occupy land. In case we are wrong in relation to the first ground, we consider below whether the Agreement should be regarded as a licence to occupy land if the storage units were immovable property.

33. HMRC submitted that the FTT erred in reaching its conclusion on this point because it did not properly apply the EU law interpretation of "leasing or letting/licence to occupy" as set out by the CJEU in *Sinclair Collis* (at [25]) and subsequent cases, i.e. that the "fundamental characteristic" of a letting of immovable property lies in, "conferring on the person concerned, for an agreed period and for payment, the right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right".

34. In summary, HMRC submitted that the Agreement did not confer on the customers "the right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right". The customers had only limited rights to allow them to deposit, inspect and retrieve goods from the unit and this was not "occupation" by the customer. Mr Jones referred us to the observations of Lord Scott in *Sinclair Collis* in the House of Lords at [77]:

> "A right, for example, to use a safe deposit box at a bank does not grant the customer a 'licence to occupy' the safe deposit box. It is the bank that is in possession and control of the whole of its premises, including the space taken up by the box. The customer has no more than a right to put things in the box and is not, in any meaningful sense, in occupation of the space taken up by the box."

35. Although we accept the observations of Lord Scott, we agree with Mr Conlon that the storage units are not safety deposit boxes. In our view, a more appropriate analogy in this case, if the units were to be regarded as immovable, is a lock-up shed or garage.

36. Mr Jones also referred us to clause 11 of the Agreement. This provided:

> "This Agreement shall not confer on you any right to exclusive possession of the Unit."

HMRC's submission was that clause 11 showed that the Agreement did not confer on the customer the right to occupy property as if the customer were the owner and to exclude any other person from enjoyment of such a right. The FTT concluded at [72] that this was intended to ensure that the Agreement did not create a lease which could give the customer security of tenure beyond the term of the Agreement.

37. We do not speculate on the reason for including Clause 11 in the Agreement but we note that it did not, in fact, prevent the customer enjoying exclusive possession of the unit as against third parties. As the CJEU held in *MacDonald Resorts* at [46]:

> "In order to determine whether a contract falls within that definition [of letting of immovable property], account should be taken of all the characteristics of the transaction and the circumstances in which it takes place. The decisive factor in this regard is the objective character of the transaction at issue, irrespective of how that transaction is classified by the parties."

38. UK Storage submitted that the FTT correctly found that all the requirements for a letting of property were present and the right of UK Storage to enter the unit in certain circumstances did not mean that the Agreement did not create a right to occupy the unit. We agree. In *Temco* [2005] STC 1451, the CJEU held, at [24]-[25], that:

> "24. … as regards the tenant's right to exclusive occupation of the property, it must be pointed out that this can be restricted in the contract concluded with the landlord and only relates to the property as it is defined in that contract. Thus, the landlord may reserve the right regularly to visit the property let. Furthermore, a contract of letting may relate to certain parts of the property which must be used in common with other occupiers.
>
> 25. This presence in the contract of such restrictions on the right to occupy the premises let does not prevent that occupation being exclusive as regards all other persons not permitted by law or by the contract to exercise a right over the property which is the subject of the contract of letting."

39. In our view, the passage from *Temco* shows that a tenant's rights can be restricted, especially as regards the competing rights of the landlord, without the supply losing its character as a right to occupy. Plainly, there must come a point when the rights are so restricted that they do not amount to occupation in any meaningful sense but we do not consider that point has been reached in the present case. The customers could act as if they were the owner of the unit by storing permitted goods there and by locking the premises with the padlock they had bought. The fact that UK Storage retained control over access in some cases, rights of entry and inspection as well as the ability to require a customer to move to another unit do not, in our view, undermine the FTT's conclusion that the Agreement between UK Storage and the customer created a licence to occupy. To conclude on this point, if we had decided that the units were immovable property then we would also have decided that UK Storage granted the customers licences to occupy the storage units.

Nature of the single supply

40. HMRC's final ground of appeal is that the FTT erred in concluding that the principal or predominant element of UK Storage's single composite supply to its customers was a licence to occupy a specific storage unit or area of land. HMRC also submitted that the FTT failed to apply *Byrom and others (trading as Salon 24) v HMRC* [2006] STC 992 and to hold that, even if a licence to occupy is predominant, nonetheless UK Storage is making a composite supply that is most obviously and naturally described as a supply of storage services, which falls outside the scope of the VAT exemption. UK Storage submitted that the findings were ones that the FTT was entitled to make and they should not be disturbed on appeal. The decision in *Byrom* did not mean that the FTT was not entitled to conclude that the dominant element was the supply of immovable property and there was no difficulty in classifying the supply as such.

41. In this case, both parties agree that there is a single composite supply (not including the insurance cover) but differ as to its true nature for VAT purposes. As UK Storage has not exercised the option to tax under part 1 of Schedule 10 to the VATA in relation to the Premises, if the single supply is properly regarded as a supply of land then it is exempt under group 1 of Schedule 9 to the VATA. If the supply is not characterised as a supply of land then it is chargeable to VAT at the standard rate (it not being suggested by UK Storage that any other exemption applies). As we have concluded that the subject matter of the agreement between UK Storage and its customers was not immovable property then it follows that the exemption cannot apply and the composite supply, however it is characterised, must be standard rated. In case we are wrong in deciding that the storage units are not immovable property, we consider briefly below whether the supply by UK Storage should be characterised as a supply of a licence to occupy or as some other service.

42. As is now well-established, the CJEU recognises two distinct types of single composite supply, namely:

(1) where two or more elements or acts supplied by the taxable person are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split (see Case C-41/04 *Levob Verzekeringen and OV Bank v Staatssecretaris van Financien* [2006] STC 766 at [22]); and

(2) where one or more supplies constitute a principal supply and the other supply or supplies constitute one or more ancillary supplies which do not constitute for customers an end in themselves but a means of better enjoying the principal service supplied (see Case C-349/96 *Card Protection Plan Limited v HM Customs and Excise* [1999] STC 270 ("*CPP*") at [30]).

43. In Case C-392/11 *Field Fisher Waterhouse LLP v HMRC*, 27 September 2012 (released after the hearing of this appeal), the CJEU considered whether a lease of immovable property which required the tenant to pay, in addition to the rent for the right to occupy the property, service charges for certain services provided by the landlord, constituted a single exempt supply or several independent supplies. The CJEU in *Field Fisher Waterhouse* did not decide whether the transactions were a

single, indivisible economic supply which it would be artificial to split (as in *Levob*) or a principal supply in relation to which the other supplies are ancillary (as in *CPP*). Instead the CJEU focused on the economic reason for concluding the lease, ie what the tenant would obtain, (see [23]) and whether the services constituted an end in themselves for an average tenant or a means of better enjoying the principal supply of leasing of commercial premises (see [25]). In the light of *Field Fisher Waterhouse*, we consider that, whether UK Storage's supply is an "artificial to split" or a "principal/ancillary" single supply, the nature of the single supply is to be found by determining the economic reason or purpose of the whole transaction from the point of view of the typical customer. This approach appears to us to be essentially the same as that taken by Warren J in *Byrom* at [70] where he refers, reflecting the language of Lord Hoffmann in *Dr Beynon and Partners v HMC&E* [2005] STC 53 at [31], to the "description which reflects the economic and social reality" of a single supply and considers it from the point of view of the recipient of the services.

44. The FTT having considered *Byrom* and *David Finnamore t/a Hanbridge Storage Services v HMRC* [2011] UKFTT 216 (TC) found at [73] that the essential feature of the supply was the licence to occupy the storage unit and the land on which it stood. The FTT decided that the other services, such security and weatherproof storage, were ancillary to the supply of immovable property and were simply a means of better enjoying the licence to occupy the immovable property.

45. In our view, this was not a conclusion that was open to the FTT on the facts that it had found. At [53], the FTT recorded and appeared to accept Mr Taylor's evidence that:

> "… the typical customer at both Bridgwater and Norton Fitzwarren 'is looking for a contained space, of which he has sole use of the storage and protection of his personal items for a period of time in a fixed location, to which no other person has access'. A particular numbered unit is let and occupies a particular area of land identified on the site plan."

At [18], the FTT had noted that Clause 11 of the Agreement between UK Storage and the customer provided that UK Storage could require the customer to move his goods to another unit. Mr Conlon submitted that the fact that UK Storage could require the customer to move his or her goods to another unit did not undermine the analysis that what was being supplied was a licence to occupy a particular area of immovable property. We agree (see [39] above) but we consider that Clause 11 and the evidence of Mr Taylor show that for a typical customer the ability to occupy a particular unit or area of land was not an end in itself but a means of better enjoying the storage services provided. The evidence was that a customer would usually specify what size of unit was required to store his or her goods but there was no evidence that any customer specified any particular unit or location. We consider that the FTT could only have inferred from the evidence that the customer was not concerned with the specific unit or location where the goods are stored but rather that the goods would be secure from loss and damage until they are needed. In our view, the licence to occupy a unit or area of land cannot be regarded as constituting an end in itself for an average customer but constitutes a means of better enjoying the principal supply, namely the

provision of secure storage of the customer's goods. We consider that the typical customer's economic reason for entering into the Agreement was to obtain storage services and that is the nature of the single supply by UK Storage.

46. In conclusion on this ground, even if we had decided that the units were immovable property and that UK Storage supplied licences to occupy the area of ground on which the units were placed, we would have decided that, taking all the circumstances into consideration, the single supply should be characterised as the provision of storage services.

Decision

47. For the reasons set out above, we conclude that the FTT made an error of law when it decided that UK Storage made an exempt supply of leasing or letting of immovable property. Our decision is that HMRC's appeal against the decision of the FTT must be allowed.

Greg Sinfield
Upper Tribunal Judge

Edward Sadler
Upper Tribunal Judge

Release date: 17 October 2012